United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1063

To Be Argued By

DANIEL J. KORNSTEIN

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UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

WYADELL EDMONDS,

Defendant-Appellant.

Appeal from an Order of the United States District Court for the Southern District of New York

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REPLY BRIEF OF DEFENDANT-APPELLANT

WYADELL EDMONDS

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REPLY BRIEF OF DEFENDANT-APPELLANT WYADELL EDMONDS

This reply brief is submitted by defendant-appellant Wyadell Edmonds in response to the brief of the United States of America.

POINT I

THE GOVERNMENT CONCEDES THAT THE DISTRICT COURT DECIDED APPELLANT'S MOTION AFTER THE TRIAL APPEAL WAS DOCKETED, THEREBY ESTABLISHING THAT THE DISTRICT COURT LACKED JURISIDCTION

The Government's brief itself sets forth the facts that deprived the District Court of jurisdiction to decide appellant's motion to withdraw his trial appeal without prejudice. In its brief the United States acknowledges that the trial appeal was docketed on October 14, 1975 and that the Court below rendered its decision on November 10, 1975 -- almost a full month later. Government Brief at 7,10. Under the provisions of Rule 42 of the Federal Rules of Appellate Procedure, docketing of the trial appeal automatically withdrew jurisdiction from the District Court, and vested sole jurisdiction in this Court to decide the motion. See Appellant's Main Brief at 16-17. It may be that the District Court did have jurisdiction when it received appellant's motion on September 17, 1975, but it did not have jurisdiction when it decided the motion on November 10, 1975. The crucial date for jurisdictional purposes is the date of decision, not the date of filing the motion.

The Government fails to appreciate the significance of the issues when it urges that even if the District Court lacked jurisdiction, "this appeal is moot because a defendant obviously cannot appeal the denial of a motion by the District Court that it had no power to grant or deny."

Government Brief at 10. But appellant has claimed that the District Court's action deprived him of constitutional rights on the trial appeal, including the right of self-representation, effective assistance of counsel, and due process and equal protection of the laws. If the District Court's action resulted in the denial of appellant's constitutional rights, such denial was real and can and should be corrected by this Court, lest district courts be encouraged to foreclose appellate review simply by acting beyond their jurisdiction.

POINT II

THE RECORD FULLY SUPPORTS APPELLANT'S CLAIM THAT HE WAS DENIED HIS RIGHT OF SELF-REPRESENTATION

The Government concedes, as it must, that "an indigent defendant has a right to defend himself pro se and to conduct his own appeal." Government Brief at 12. But contrary to the assertions in the Government's brief, appellant's claim that the decision below deprived him of his constitutional right of self-representation is fully supported by the record.

In his motion filed September 17, 1975, appellant sought

> leave to withdraw his/any Appeal that was submitted in/at the Court below (against his will/wishes/desires) by Kirkland Taylor Esq., on/about August 18, 1975.

Appellant added that he wanted the means whereby "he could properly prepare his appeal and present said issues unto this said Court...."

Appellant's letter of October 9, 1975 gives additional reasons for granting the motion.

In his pro se notice of appeal filed on February 5, 1975 with regard to the decision below, appellant again set forth his claim that he wanted to prosecute his trial appeal pro se.

In the eyes of the Government, the documents drafted by appellant while in prison

> were certainly confusing enough so that their meaning could be interpreted in different ways. In no sense did they amount to a clear request by Edmonds that the efforts of this third assigned counsel be ignored and that he be allowed to pursue the appeal pro se.

Government Brief at 12-13.

We disagree.

In the first place, appellant's words speak for themselves and show that he wanted to prosecute his trial appeal himself. His moving papers constitute an explicit request to proceed pro se on his trial appeal, and a clear waiver of his right to assigned counsel. That is why he filed his motion to withdraw his trial appeal without prejudice.

In the second place, appellant's motion was not drafted by an attorney and cannot be tested by the high standards applicable to an attorney's work product. Appellant's pro se motion, like pro se pleadings, "should be treated with solicitude. Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Frankos v. LaValee, ___F.2d___(2d Cir. 1976)." Burgin v. Henderson, 536 F.2d 501, 502 n. 1 (2d Cir. 1976). He made his motion to withdraw the trial appeal without prejudice and spelled out his reasons for so moving as best he could, considering he had had no chance to see rejected counsel's brief.

The facts belie the Government's effort to deflect this Court's attention away from appellant's self-representation claim by appellant's motion in the court below as a disguised request for additional time. This,

the Government says, "amounts to a means of delaying or obstructing proceedings" requiring denial of appellant's request to proceed pro se even if it were clear. Government Brief at 13. But no attempt at delay or obstruction can be attributed to appellant. He filed his motion on September 17, 1975 -- before the appeal was docketed and before his rejected counsel's brief was filed. His motion was not belated,* nor was it calculated to frustrate the administration of justice. He was in prison the whole time. Moreover, if the District Court thought that a delay of six months was too much, it could have reduced that time period to one it considered more reasonable. In context, appellant's request for a six-month extension was ancillary and subordinate to his basic request for leave to prosecute his trial appeal pro se.

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* Appellant apparently mailed his motion on August 27, 1975, barely one week after sentencing. See letter of October 9, 1975,

POINT III

THE GOVERNMENT HAS FAILED TO REFUTE APPELLANT'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON THE TRIAL APPEAL

Nothing in the Government's brief refutes or contradicts appellant's claim that he was denied effective assistance of counsel on the trial appeal.

Three salient facts exist to show such ineffective assistance:

1. Rejected counsel failed to discuss trial appeal strategies and tactics with appellant;

2. Rejected counsel, without consulting appellant, without evaluating the decision with appellant, and without even informing appellant of the choice, failed to make a non-frivolous argument on appeal that appellant wanted made; and

3. Rejected counsel failed to inform appellant of the outcome of the trial appeal and to take steps to preserve appellant's right to further appeal.

The Government cannot deny that appellant's rejected counsel failed to consult with and advise appellant regarding the trial appeal. Rejected counsel's affidavit of September 23, 1975 does not "squarely refute" the claim that appellant had only one face-to-face meeting with rejected counsel. That affidavit merely states that rejected counsel had several conversations with appellant;

it does not state the subject matter of those conversations nor whether such conversations were face-to-face or by telephone. The affidavit simply will not bear the construction put on it by the Government. Equally meritless is the Government's reliance on the Sentencing Minutes of August 18, 1975 as any indication as to the nature of the relationship between appellant and rejected counsel at a later date. Furthermore, appellant's pro se notice of appeal dated February 5, 1975 fully supports appellant's version of his relationship with rejected counsel.

Nor can the Government deny that rejected counsel failed to follow appellant's instruction to argue that appellant was denied his right to "confront his accusers" because he was unable to cross-examine the informant who provided the probable cause for appellant's arrest, but who did not testify at trial. The Government tries to create the impression, however, that this Court already considered that argument on the trial appeal. But this Court did no such thing. The argument based on Roviaro v. United States, 353 U.S. 53 (1957), is not the same; nor is it settled that the Confrontation Clause does not extend to "accusers" who do not testify at trial. We disagree with the Government that appellant has not provided "the barest hint of what the theory of such an argument" would be or that "counsel has not even articulated

any possible rational argument." Government Brief at 16. We have so limned the confrontation argument. See Appellant's Main Brief at 42-43. In brief, the argument proceeds as follows:

> a. Appellant was denied an opportunity to confront or cross-examine the informant who played a large role in making the case against appellant but who did not testify at the trial.
>
> b. The Confrontation Clause of the Sixth Amendment guarantees appellant the right to confront and cross-examine his accusers.
>
> c. Ergo, appellant was denied his constitutional right of confrontation.

The only step in the syllogism at all open to question is step "b" regarding the scope of the Confrontation Clause, which is as yet unsettled.* Although the informant did not testify in court against appellant, the informant was arguably one of appellant's "accusers," and, as the Supreme Court said in California v. Green, 399 U.S. 149, 156-157

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* This Court's per curiam decision in D'Ercole v. United States, 361 F.2d 211 (2d Cir. 1966), is not dispositive because there the Government disclosed the name and address of its informer but did not produce him at trial, whereas here the Government has refused even to disclose its informant's identity, thereby preventing appellant from calling him or her. Moreover, the Court in D'Ercole did not canvass the relevant historical materials to show the intended scope of the Confrontation Clause.

(1970),

> [T]he particular vice that gave impetus to the confrontation claim was the practice of...denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact.

That an "anonymous accuser" might be something different from "witness," and that both are encompassed by the Confrontation Clause is borne out by Justice Harlan's concurrence in Green (Id. at 179): "...[T]he Confrontation Clause was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." Appellant's point is that rejected counsel refused to press this confrontation argument and it has not yet been fully made in this case, and that appellant seeks the opportunity to present in depth his views on this important and unsettled issue, an issue requiring considerable historical research as to the genesis of the Confrontation Clause.* At this time appellant need

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* Appellant may have other, new grounds for reversal. For example, there may be a possibility that the sentencing court relied on misinformation that appellant may not have had a full opportunity to counter effectively, thereby constituting plain error and an abuse of discretion. See, e.g., United States v. Robin, ___F.2d___, Dkt. No.76-1033 (2d Cir. October 15, 1976) (Slip Op. at 5834-5841). There may also be a possibility that the trial court did not properly charge the jury on the issue of entrapment. See, e.g., United States v. Brown, ___F.2d___, Dkt. No. 76-1142 (2d Cir. November 8, 1976).

not set forth a full dress argument; this is not an appeal on the merits of the confrontation argument. It is sufficient for appellant merely to show that appellant requested rejected counsel to make a non-frivolous argument, and that rejected counsel refused to do so. It will be time enough to flesh out the confrontation argument when this Court's prior affirmance is vacated. Nor do we think that serious and substantial arguments based on the United States Constitution should be dismissed by the Government without a hearing as "baseless and frivolous."

The Government winks at rejected counsel's failure to press the confrontation argument by saying that rejected counsel "would simply have been acting as the errand boy of his client and that is not the role of assigned counsel." Government Brief at 16-17. The Government does not deign even to treat with the authorities cited in appellant's main brief, nor is the Government apparently aware of the relevant practice on indigent appeals in this State. For example, every assigned appellate counsel in the Second Judicial Department of the Appellate Division of the Supreme Court of New York State receives a notice, annexed to this brief as an Appendix, in which the court states among other things:

> ...[I]t is suggested that:
>
> (4) You communicate promptly with the appellant, advising him of your assignment and asking him for any suggestions he may have as to the points he wishes to have you submit on his appeal.

> (5) If after examining the record and after diligent research you cannot find a meritorious point, you nevertheless should submit a brief setting forth: (a) a digest of the essential facts; (b) a statement that you have communicated with the appellant, requesting him to advise you as to the points which he wants you to submit; (c) a statement of those points which he has asked you to submit; and (d) any argument that you may be able to make in support of the points urged by the appellant....
>
> It should be emphasized that with respect to this appeal the appellant is your client and he should be treated as such. Under the law, you may neither reject his cause nor be relieved of your [illegible]ment, since the appellant has the absolute, unqualified right to prosecute his appeal to this Court regardless of your opinion as to its merit. Therefore, under no circumstances, should you disparage, either to him or to this Court, the validity of any point asserted on his behalf, regardless of your personal feelings; nor should you give any intimation that you lack faith in the merit of his appeal. It is for this Court to determine whether any of the points submitted is valid, and whether it is sufficient to warrant reversal or modification. Of course, as already indicated, in your brief you may enumerate separately those points which you are urging upon appellant's insistence or at his suggestion.

This official notice well states the policy of the law, both federal and state, in this area. Appellant's rejected counsel did not comply with this policy, and nothing the Government can say will change that fact.

Nor can the Government change the fact that rejected counsel failed to notify appellant of the outcome of the trial appeal. By failing to so inform appellant, rejected counsel not only violated his ethical and professional responsibility, but also violated the Rules

of this Court.* Rule 4(b)(e) of this Court's Rules Supplementing the Federal Rules of Appellate Procedure sets forth explicit requirements for assigned appellate counsel following an adverse decision on appeal:

> (e) If, after an adverse decision by the Court of Appeals, a review by the Supreme Court of the United States is to be sought, the appointed counsel shall, after communication with the appellant and if requested to do so, petition the Supreme Court for certiorari, unless upon proper motion filed within seven days after the entry of judgment with supporting papers indicating that such petition for certiorari would be wholly frivolous counsel is relieved of that obligation by the Court. If counsel is relieved, he shall within seven days after such motion is granted so advise the appellant in writing and inform him concerning the procedures for filing a petition for a writ of certiorari pro se. Retained counsel shall follow the same procedure unless satisfied that the defendant does not desire to petition for certiorari or has retained other counsel.

Appellant's rejected counsel neither communicated with appellant regarding a possible petition for certiorari nor did rejected counsel move this Court to be relieved because a petition for certiorari would be wholly frivolous.

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* The State assigned appellate counsel notice, contained in the Appendix, states at the top of the page in bold face type and all capitals: "ASSIGNED COUNSEL IS REQUIRED TO NOTIFY DEFENDANT IMMEDIATELY OF THE DECISION ON THE APPEAL."

Seeking to avoid the inevitable prejudice flowing from rejected counsel's failure to notify appellant of the outcome of the trial appeal, the Government mistakenly relies on a notice of a different decision mailed by the Pro Se Clerk's Office to appellant on June 22, 1976. The decision mailed to appellant on June 22, 1976 concerned a pro se bail application and contains in the lower right hand corner of appellant's request the following barely legible hand-written notation:

> "Memorandum. There having been an affirmance in the Court of Appeals the issues are moot and the application is therefore denied.
>
> 6/2/76 Richard Owen
> U.S.D.J."

This notice, whatever its effect, does not constitute notice by rejected counsel, nor for that matter could appellant, an indigent non-lawyer, reasonably have been expected to understand and assess the impact of Judge Owen's oblique reference to this Court's affirmance. If this notice is the reed upon which the Government plans to rest, it is a slender reed indeed.

Conclusion

For the reasons given herein and in appellant's main brief, this Court should vacate its prior affirmance of appellant's conviction and allow a new appeal. Alternatively, this Court should order that this appeal be set down for reargument and rebriefing limited to issues not raised on the trial appeal.

Dated: New York, New York
December 2, 1976

Respectfully submitted

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Daniel J. Kornstein,
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APPENDIX

Appellate Division, Supreme Court
Second Judicial Department

NOTE:
IF SOLE ISSUE IS EXCESSIVENESS, ETC. OF SENTENCE PROCEED BY MOTION SECTION 670.17 SUBD. i RULES OF THIS COURT

ASSIGNED COUNSEL IS REQUIRED TO NOTIFY DEFENDANT IMMEDIATELY OF THE DECISION ON THE APPEAL

TO EVERY ASSIGNED LAWYER (INCLUDING ANY LAWYER FOR A LEGAL AID SOCIETY):

This Court, by order enclosed herewith, has assigned you as attorney for the appellant on his pending appeal in this Court.

By direction of the Court, you are advised that:

(1) If the appeal is from an order entered on papers without the taking of testimony, you must bring the appeal on for argument no later than 120 days from the date of this Court's order assigning you as counsel.

(2) If the appeal is from a judgement or from an order entered after the taking of testimony, you must bring the appeal on for argument no later than 120 days from the date a certified transcript of the stenographer's minutes has been filed in the trial court; and it is your duty to arrange with the trial court for the prompt filing of two copies of the transcript (CPL 460.50, subd. 4; CPL 460.70, subd. 1).

(3) If any extension of time is required, it is your obligation to apply therefor by written motion, on notice, returnable PRIOR to the times above-mentioned.

In addition to the foregoing requirements, it is suggested that:

(4) You communicate promptly with the appellant, advising him of your assignment and asking him for any suggestions he may have as to the points he wishes to have you submit on his appeal.

(5) If after examining the record and after diligent research you cannot find a meritorious point, you nevertheless should submit a brief setting forth: (a) a digest of the essential facts; (b) a statement that you have communicated with the appellant, requesting him to advise you as to the points which he wants you to submit; (c) a statement of those points which he has asked you to submit; and (d) any argument that you may be able to make in support of the points urged by the appellant.

(6) Your brief should also comply with subdivisions "e" and "f" of Section 670.16 of our rules; and, with respect to the record, you must comply with subdivision "L" of Section 670.1 of our rules.

(7) Before filing your brief with this Court, you should mail a copy thereof to the appellant.

(8) You are required to file the record and to serve and file your brief and a note of issue at least 52 days before the first day of the term for which you bring the appeal on for argument.

(9) After this court's determination of the appeal, it is your duty to comply with Section 671.4 of the rules of this Court (22A NYCRR 671.4).

It should be emphasized that with respect to this appeal the appellant is your client and he should be treated as such. Under the law, you may neither reject his cause nor be relieved of your assignment, since the appellant has the absolute, unqualified right to prosecute his appeal to this Court regardless of your opinion as to its merit. Therefore, under no circumstances, should you disparage, either to him or to this Court, the validity of any point asserted on his behalf, regardless of your personal feelings; nor should you give any intimation that you lack faith in the merit of his appeal. It is for this Court to determine whether any of the points submitted is valid, and whether it is sufficient to warrant reversal or modification. Of course, as already indicated, in your brief you may enumerate separately those points which you are urging upon appellant's insistence or at his suggestion.

In the event an order has been issued pursuant to section 460.50 of the Criminal Procedure Law staying execution of the judgement pending determination of the appeal, your attention is called to subdivision 4 of that section requiring you to perfect the appeal within 120 days after issuance of the order or the defendant must surrender himself to commence execution of the sentence, unless this Court grants an application by you for an extension of time.

In connection with all of the foregoing, your attention is directed to Canons 1 and 4 of the Canons of Professional Ethics.

NOTE: - COUNSEL FOR INDIGENT DEFENDENTS ARE REQUIRED TO RETURN THE TRASCRIPT TO THE COURT CONCURRENTLY WITH THE FILING OF APPELLANT'S BRIEF.